

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6731**

**PETITION OF KANU AND LATA PATEL**

**OPINION OF THE BOARD**

(Hearings held January 26, 2022, and April 6, 2022)  
(Effective Date of Opinion: April 15, 2022)

Case No. A-6731 is an application for a variance necessary for the proposed construction of a swimming pool. The proposed construction requires a variance to be located forward of the rear building line. Section 59-4.4.4.B.c of the Montgomery County Zoning Ordinance requires that accessory structures be located behind the rear building line of the principal building.

Due to COVID-19, the Board of Appeals held a remote hearing on the application on January 26, 2022. Petitioner Kanu Patel and his son, Chirag Patel, participated via Microsoft Teams in support of the requested variance. Neighbors Laura Papageorge, Peter Passero, Heather Tortorelli, and Benjamin Ginsberg participated to seek information and express their concerns. After hearing from all interested persons at the January 26, 2022, hearing, the Board voted to continue the matter for the submission of additional evidence. The Board held a second remote hearing, again using Microsoft Teams, on April 6, 2022. Petitioner Kanu Patel and his son, Chirag Patel, participated in the April 6, 2022, hearing, as did neighbors Charles "Bob" Marshall and Peter Passero.

Decision of the Board:                      Variance **GRANTED**.

**EVIDENCE PRESENTED**

**Evidence Submitted for the January 26, 2022, Hearing**

1.     The subject property is Lot 37, Block A, Potomac View Estates Subdivision, located on the east side of Piney Meetinghouse Road at 10805 Piney Meetinghouse Road in Potomac, Maryland, 20854, in the RE-2 Zone. The property is a four-sided property, much deeper than it is wide, measuring approximately 150.49' wide along its front/west

lot line, 536.08 feet deep along its left side/north lot line, 203.37 feet wide along its rear/east lot line, and 470.95 feet deep along its right side/south lot line. The property has a slightly angled rear lot line, and no parallel sides. It is two (2) acres in size. See Exhibit 4.

2. The property is improved with a main house and rear addition, still under construction, that together form a "U" shape. See Exhibits 3 and 4.

3. The property slopes downward from front to rear, such that the peak elevation in the front yard is 326 feet, the elevation at the left rear and right rear corners of the addition are 316 feet and 311 feet, respectively, and the elevation at the rear property line is 304 feet. The Petitioner's Statement of Justification ("Statement") indicates that the property has two "drop offs," one by the main house and a second after the addition. See Exhibits 3 and 4.

4. The Statement states that the proposed pool would be located "behind the main house but alongside and in front of" the addition. The Statement states that the Petitioners' architect "designed the pool to be located at the flattest part of the lot and to have the house be located around the pool, creating a courtyard for the pool" and that "[t]he natural topography of the land is what dictated the location of the pool when it was originally designed." The Statement notes that the land behind the house "is not flat enough to build a pool," and in addition, that "there are many old, large trees and a creek." See Exhibit 3. The Site Plan contains topographic lines illustrating the slope of the property, including the area behind the rear building line of the house. See Exhibit 4.

5. The Statement indicates that the requested variance is the minimum needed to overcome the topographical challenges of the property, stating that "[g]iven the topography of the lot, the location of the pool [that the Petitioners] are proposing is the only area where land is flat enough and where the pool would not be seen from the main road." See Exhibit 3.

6. Regarding the impact of the proposed pool on neighboring property owners, the Statement states that "[t]he pool will be hidden by the main house from the main road," and that "[t]here is only 1 neighbor that would be able to see the pool and they are aware of the location of the pool and have no objections,"<sup>1</sup> noting that the pool "will be hidden from all other abutting and confronting properties." The Statement further notes that "the pool will be further back than our neighbor's pool who has a lot parallel to ours." See Exhibit 3.

#### **Additional Evidence Submitted Prior to the April 6, 2022, Hearing**

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<sup>1</sup> The Board notes that while the record at the time of the January 26, 2022, hearing did not contain any opposition from this neighbor, following the continuance of the hearing for the submission of additional evidence, this neighbor (Charles "Bob" Marshall) did submit opposition to the grant of the requested variance. See Exhibits 12 and 14.

7. Charles "Bob" Marshall, who owns the property that abuts the subject property to the south, submitted two letters with attachments opposing the grant of the requested variance. See Exhibits 12 and 14. Mr. Marshall's first letter states that granting the variance will be adverse to his family's use and enjoyment of their property, noting that the pool will be "very close" to the shared fence line, and that placement of the pool in this location will result in "increased noise, negative effects to our grounds from water-related issues, and other forms of nuisance." This letter states that mitigation of these problems would likely cause his family to incur "substantial costs." See Exhibit 12.

Mr. Marshall states in his first letter that he has consulted with several real estate agents who believe approval of the variance will have an adverse effect on the value of his property. He includes letters from four established real estate agents as attachments to his letter. All of the agents conclude that construction of a swimming pool in the proposed location would have a negative impact on the value of the Marshalls' home. Exhibits 12(b)-(e).

In addition, Mr. Marshall includes a letter and photographs from Steve Hall, the owner of Aspect Tree Services, Inc., as an attachment to his first letter. Mr. Hall states in his letter that changes to the pre-existing elevations on the subject property, done in connection with construction of the addition, have created a negative grade between the subject property and Mr. Marshall's property. See Exhibit 12(a). Mr. Hall's letter states that this has created water problems for the surrounding area, and that in his professional opinion, the construction of a swimming pool would further "exacerbate water displacement," which in turn would "add to the settling of ground water." Mr. Hall's letter also notes gully-washing that has resulted from the negative grade, and includes photographs showing this and accumulated silt on the silt fence. Finally, Mr. Hall's letter enumerates the negative effects that this water will have on Mr. Marshall's property, as follows:

How will this directly affect you:

- 1) Established existing White Pine trees along shared fence line- redirected water will fill the water table underground and create ground water pockets. Combined these two factors will change the soil integrity causing root damage and heart rot in the Pines trees. Their demise is inevitable.
- 2) As mentioned previously, when the water table is full then ground water accumulates. The area becomes a breeding ground for insects, then moles which draws snakes and other wildlife.

Please understand that even after the neighboring property has a final grade performed, after both the home addition and the swimming pool, unfortunately it will not disperse the ground water sufficiently enough to counter the amount of ground water that collects and in turn will damage the surrounding plant material.

See Exhibit 12(a). Finally, Mr. Hall's letter states that he had considered "several fast-growing hardwood species and evergreens for new plant material installations," but that "none of them will thrive in the current wet environment." See Exhibit 12(a).

Mr. Marshall also sent the Board a second letter, attached to which were three photographs, on the morning of the hearing. His second letter states that the fence which has stood on the shared property line for 25 years is now "falling down and coming apart," and the photographs he submits show this fence. Mr. Marshall asserts in this letter that the condition of the fence "is a direct result of a house/addition being built a few feet away that has altered the way the water flows," and suggests that construction of the proposed pool on the subject property would exacerbate adverse impacts to his property. See Exhibits 14 and 14(a)-(c).

8. The Petitioners submitted a letter dated March 28, 2022, with attachments, providing the Board with the additional information requested at the end of the January 26, 2022, hearing. See Exhibit 13. Specifically, the Petitioners submitted the plan that they had shared with the zoning reviewer at the County's Department of Permitting Services ("DPS") in their initial discussions with that Department. This plan includes the proposed swimming pool. The Petitioners' letter states that they shared this overall plan of the project, including the pool, without any issue. See Exhibit 13(a). The Petitioners also submitted more detailed plans, also showing the proposed pool, which they state were approved by DPS, again without issue. See Exhibit 13(b). The Petitioners state in their letter that if, during the review process, anyone at DPS had told them that the pool needed to be behind the new rear building line, they would have applied for a pool permit before getting permits for the addition. See Exhibit 13.

The Petitioners also provided photographs of the subject property and surrounding area with their submission, intended to better orient the Board to the location of the proposed pool, and a Site Plan marked to show the locations and directions from which the photographs were taken. See Exhibits 13(c) and (d). The Petitioners' letter states that the pool will not be visible from the street. Finally, the Petitioners have submitted a proposed Landscape Plan (Exhibit 13(e)). The Petitioners' letter states that the Landscape Plan was prepared by a landscape architect, and that it is a "Master Plan" that the Petitioners would hope to complete over a number of years rather than all at once. Their letter closes by stating that as shown by the photographs, the pool will be hidden from the neighbors, and by asking the Board not to make immediate implementation of the Landscape Plan a condition of the variance. See Exhibit 13.

#### **Evidence Presented at the January 26, 2022, Hearing**

9. At the January 26, 2022, hearing, the Petitioner Kanu Patel testified that he has lived in his house for 32 or 33 years. Dr. Patel testified that his son and grandchildren had moved in with him because of the COVID pandemic.

10. The Petitioners' son, Chirag Patel, testified that his parents originally built the house on the subject property in 1989, and by doing so, they created the property's rear yard. He testified that they have since built an addition to the house that pushed the rear

yard so far back on the property that there is now sloped topography that does not allow for a pool behind the house. He testified that the addition had been designed to accommodate a pool in the "courtyard." Mr. Patel testified that the proposed pool would not be visible from Piney Meetinghouse Road. He testified that the pool would be visible to the neighbor whose property abuts the subject property to the south, that he had spoken with this neighbor, and that this neighbor had no objections.<sup>2</sup>

11. Laura Papageorge testified that her property abuts the subject property to the rear, and questioned how close the proposed pool would be to her fence, indicating that the Petitioners' rear yard is visible from her property, especially in the winter. Mr. Patel testified, in response to Ms. Papageorge's question, that his parents are seeking this variance so that they do not have to build the pool behind their home, but rather can locate it between the main house and the addition, such that she would not be able to see it from her property.

12. Heather Tortorelli, whose property abuts the eastern portion of the subject property's northern (left side) lot line, asked Mr. Patel if the proposed pool would be visible from her side of the subject property (left side) or from the opposite side (right side), where Bob Marshall lives. Mr. Patel testified that the pool would be visible from Mr. Marshall's side of the property.

13. Peter Passero, whose property abuts the western portion of the subject property's northern (left side) lot line, testified that he has owned his property since 1981. Dr. Passero testified that his property has the largest exposure to the left side of the Petitioners' property. He stated that there is an elevated connection between the Petitioners' original house and the addition, and that he is concerned that a portion of the proposed pool and any decking that might surround the pool could be visible from his deck if he looks under the elevated connection. Dr. Passero testified that his family uses their deck frequently, often to entertain, and that he is concerned about the potential visibility of the Petitioners' proposed pool from that deck.

Ms. Tortorelli stated that she has the same view as the Passeros, and that anything that could be done to screen the view of the proposed pool would be appreciated. In response to a Board question asking if there were any plans to screen the pool from neighboring properties, Mr. Patel testified that there are some older trees on that area of the property that could possibly be replaced with evergreens, but that this was something they still needed to figure out.

14. Benjamin Ginsberg, whose property also abuts the subject property to the rear, testified that he would not be able to see the proposed pool, and so is not concerned about that, but is concerned about whether the pool would add to drainage and water problems on his property. He asked what drainage and overflow protections had been

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<sup>2</sup> In response to a Board question, Mr. Patel testified that this neighbor's name is Bob Marshall. The Board notes again here that Mr. Marshall did not participate in the January 26, 2022, hearing, and did not submit anything to the Board prior to that hearing date, but that Mr. Marshall did submit opposition to the requested variance after the January 26, 2022, proceedings were continued for the submission of additional evidence. See Exhibits 12 and 14.

made to protect the downhill properties such as his. In response to this question, Mr. Patel testified that they had to do a field drainage plan in connection with the construction of the addition, and as a result, they had installed 10 dry wells and two other drainage systems, and as a result that all water coming from improvements on the subject property would be drained 10 to 15 feet below the earth.

### **Evidence Presented at the April 6, 2022, Hearing**

15. Chirag Patel testified about the additional materials submitted by his father in support of the requested variance. He testified that when the project was originally discussed with DPS, the addition was proposed as a detached guest house, and that they were informed by DPS that the structure could not be that large. See Exhibit 13(a). Mr. Patel testified that the zoning reviewer at DPS told them that in order to build the proposed structure, it would have to be connected to the existing house. He testified that the Petitioners submitted the plan in the record at Exhibit 13(b) to the County, and that DPS stamped and approved that plan, which shows the existing house in red and the proposed construction in black. Mr. Patel testified that this plan depicts the proposed pool.<sup>3</sup> See Exhibit 13(b). He testified that if anyone at DPS had told them that the pool had to be behind the rear building line of the house, they would have pulled the permits for the pool before pulling the permits for the addition, and would not have needed the requested variance.

In response to a Board question, Mr. Patel testified that the size and location of the pool being proposed now are the same as is shown on Exhibit 13(b). He testified that when the survey was done, the plan started with the pool because of the property's topography. Mr. Patel estimated that the pool is approximately 12 feet from the addition and about 70 or 80 feet from the property line shared with the Marshalls (i.e. the southern side property line). He testified that the landscaping plan shows trees that would be placed along the property line shared with the Marshalls. See Exhibit 13(e). In response to a Board question asking if construction of the pool would aggravate the negative grade towards the Marshall property, and how that would be mitigated, Mr. Patel testified that Potomac Valley Surveys had surveyed the property, and that as a result of this survey, the Petitioners had installed multiple dry wells and two (2) microinfiltration devices to control water. He testified that as designed, the plan will reduce water, and that the water should flow to the rear of the property. Mr. Patel stated that the dry wells are 15 or 20 feet deep. He testified that if the Petitioners do not construct the pool, they will construct a patio in that location.

Mr. Patel testified that he had marked up the Site Plan in the record at Exhibit 13(c) to show where the photographs at Exhibit 13(d) were taken, and he explained what each of the photographs depicts. See Exhibits 13(c) and (d). He testified that he believes the requirement that accessory structures be located behind the rear building line of the primary structure was established so that a person could not see the accessory structure, and he testified that the pool will not be in view from the front of the subject property. In

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<sup>3</sup> The Board notes that the plan at Exhibit 13(a), which Mr. Patel indicated was the plan originally discussed with DPS, also shows the pool.

response to Board questions about fencing, Mr. Patel testified that they would replace the wooden fence on the northern side of the property once construction was finished; he testified that the wrought iron fence on the southern side of the property belongs to Mr. Marshall. In response to a Board question asking about the timing for completion of the landscaping plan, Mr. Patel testified that "Phase 1" of the installation would include the plantings along the southern property line shared with Mr. Marshall and the plantings under the breezeway. He testified that "Phase 2" would include the trees on the southwest corner of the pool and towards the rear (southeast) of the property. See Exhibit 13(e).

16. Charles "Bob" Marshall began his testimony by stating that the Petitioners are friends of his, and that his testimony is not personal to them, but is strictly intended to convey the issues that construction of the proposed pool will cause him.

Mr. Marshall testified that construction of the proposed pool would be adverse to use of his property. He testified that the pool would be close to his fenceline, and would cause an increase in noise and water issues for his property. Mr. Marshall testified that there was a "lake" behind the Petitioners' house on the day of the hearing. He testified that this accumulation of water was a recent phenomenon, and was attributable to the construction of the Petitioners' addition; he stated that he did not know what adding a pool to the Petitioners' property would do due to the current water situation.

Mr. Marshall testified that the Petitioners' property is two acres in size, and that there were lots of places to locate a swimming pool and lots of things the Petitioners could have done to accommodate a pool. Mr. Marshall testified that contrary to the assertions made in the Statement (Exhibit 3), the Petitioners' proposed pool would be parallel to or in front of his pool, and he "highly objects" to its proposed location. Mr. Marshall testified that he is very concerned about the proposed construction and that he believes it will cause major damage to his lawn, stating that his fence did not used to lean and is already coming down. See Exhibit 14(a)-(c). Mr. Marshall testified that the landscaper/arborist that he had contacted indicated that his yard will be destroyed and that nothing will grow because of water issues. See Exhibit 12(a). He testified that his back yard will become unusable and that he will be unable to coach his children there. Mr. Marshall testified that the pool would be on a "major slope," presumably referring to the elevation difference between the subject property and his property, which he later likened to a ski slope or "muddy slide." He testified that this will cause major issues for his property, and that the trees currently growing along the shared fenceline will die.

Mr. Marshall testified that he obtained letters from four of the top realtors in the nation, who he had visit his property. See Exhibits 12(b)-(e). He read the letters into the record, and noted that all four realtors had concluded that construction of the proposed pool would negatively impact the value of his property. In response to a Board question asking why the proposed pool would have this impact, Mr. Marshall testified that people seeking to live in Potomac are generally seeking wide open space, and that the proposed pool would be close to the property line, would damage his property, and would cause an increase in noise. He further testified that the landscaper he had contacted said that the

trees between the properties would certainly die. Finally, Mr. Marshall testified that if his back yard was unusable because it was soaked, that was also an issue. In response to Board questions asking if the water problem had always existed, and if it was possible that the water was coming from other properties, Mr. Marshall testified that when his family purchased their home, they gutted it and put in pipes to deal with the water and direct it away from their house. He testified that they have had the current water problems since the Petitioners constructed their addition, stating that the water on the Petitioners' property used to flow from the back of their house to the creek at the rear, and that it is now being forced to the side and down the slope onto his property. When asked if it was possible that the work the Petitioners are doing would correct these water problems, Mr. Marshall stated that he assumed it would be better, but that he would like something to be done with the water, such as the construction of a berm or other abatement device.

Mr. Marshall testified that it is nerve-wrecking to have a pool with small children, even if they are good swimmers, and asked the Petitioners to consider if this is really something they want at their house. He testified that he objects to the grant of the requested variance, and that he wished it wasn't that way.

17. In response to Mr. Marshall's testimony, Mr. Patel testified that the current conditions are temporary, and that the fence that is supposed to be collecting the water is doing its job and is protecting the Marshall's fence, which he stated has been leaning since before construction began. Mr. Patel testified that once the Petitioners have grass, the situation will abate. He testified that the dry wells have been inspected and were correctly built, but that they will not be connected until the end of the project, when the gutters are installed. Dr. Patel testified that the current situation is temporary, and implored Mr. Marshall to please bear with them until the construction is finished.

Mr. Patel testified that the drainage issues had been addressed by engineers, and that the record contained engineered drawings. See Exhibit 13(b). He testified that the installation of a pool would be no different than the installation of a patio.

18. Peter Passero testified that his biggest concerns are the noise from and visibility of the proposed swimming pool, and stated that he does not want to see the pool or patio. He testified that these are large properties, and that noise reverberates. Dr. Passero stated that he had spoken with the Petitioners about his concerns. He testified that he does not have drainage issues.

## **FINDINGS OF THE BOARD**

Based on the binding testimony and evidence of record, the Board finds that the requested variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E.2 of the Zoning Ordinance, as follows:



1. *Section 59-7.3.2.E.2.a - one or more of the following unusual or extraordinary situations or conditions exist:*

*Section 59-7.3.2.E.2.a.i. - exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;*

The Board finds, based on the Statement and the Site Plan, that the subject property is encumbered with a significant downward slope, most notably in the areas beside the original house and behind the addition. See Exhibits 3 and 4. The Board finds that the property's topography, again notably in the area where accessory structures such as a swimming pool would otherwise be allowed, constitutes a unique condition peculiar to this property, in satisfaction of this element of the variance test.

2. *Section 59-7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds, in accordance with the Statement and Site Plan, that the proposed location of the pool is the flattest area of the property, and that "[t]he natural topography of the land is what dictated the location of the pool when it was originally designed." See Exhibits 3 and 4. The Board further finds, based on the testimony of Mr. Patel and Exhibits 13, 13(a), and 13(b), that the proposed construction of the addition and swimming pool were presented simultaneously to DPS for review, and that the Petitioners were not informed that construction of the addition before construction of the swimming pool would trigger the need to obtain a variance for the pool. Accordingly, the Board finds that this element of the variance test is satisfied.

3. *Section 59-7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds that the sloping topography of this property, particularly behind the rear building line of the house, constrains the ability of the Petitioners to construct the proposed pool in accordance with the locational requirements in the Zoning Ordinance, causing them a practical difficulty. The Board further finds that the requested variance is the minimum needed to overcome this practical difficulty and allow the proposed construction, in satisfaction of this element of the variance test.

4. *Section 59-7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*

The Board finds that granting the requested variance, necessary to allow construction of the proposed swimming pool, would continue the residential use of the home, consistent with the recommendations of the Potomac Subregion Master Plan (2002). Accordingly, the Board finds that this element of the variance test is satisfied.

5. *Section 59-7.3.2.E.2.e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

The Board finds, based on the Statement and the testimony of Mr. Patel, that the proposed pool would not be visible from the main road or to any neighboring properties except the Marshall property. See Exhibit 3. The Board further finds that the Petitioners have presented a landscaping plan that will screen any view of the pool from the Marshall property, and any potential view under the breezeway from the Passero property, and the Board conditions the grant of this variance on the installation of that landscaping. See Exhibit 13(e).

With respect to drainage, the Board finds, based on the testimony of Mr. Patel, that dry wells and microinfiltration devices have been installed on the property to control water, pursuant to an engineered plan, but are not yet connected and operational. While it is hoped that these dry wells and other abatement devices will succeed in diverting excess water away from neighboring properties, in order to ensure that the proposed construction is not adverse to the use and enjoyment of the Marshall property, the Board will impose a requirement that the Petitioners hire a neutral, third-party engineering firm, agreed upon by the Petitioners and Mr. Marshall, to assess runoff from the property as it exists prior to construction of the proposed pool and as potentially exacerbated by construction of the pool, and to develop and implement a plan to mitigate any excess runoff caused by the pool that is not adequately managed by the existing system of dry wells and microinfiltration devices. With these conditions, the Board finds that granting the requested variance, needed to allow the proposed construction, will not be adverse to the use and enjoyment of abutting or confronting properties, in satisfaction of this element of the variance test.

Accordingly, the requested variance is **granted**, subject to the following conditions:

1. Petitioners shall be bound by the testimony and exhibits of record;
2. Petitioners shall implement the landscape plan in the record at Exhibit 13(e); landscaping near the breezeway and along the southern property line shall be installed before the pool is operational in order to block the view of the pool from the abutting properties to the north and south;
3. Prior to construction of the proposed swimming pool, Petitioners shall hire and pay for an independent, third-party engineering firm, mutually agreed upon by the Petitioners and Mr. Marshall, to (A) assess runoff from the subject property towards the Marshall property (i) as it currently exists and (ii) as potentially exacerbated by construction of the proposed swimming pool, and (B) develop and implement a plan to remediate any additional runoff created by the pool; and
4. Construction shall be in accordance with Exhibits 4 and 5(a)-(c), with any modifications necessitated to implement the remediation plan developed pursuant to Condition No. 3, above.

Therefore, based upon the foregoing, on a motion by Roberto Pinero, seconded by John H. Pentecost, Chair, with Richard Melnick, Vice Chair, and Caryn Hines in agreement, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

  
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John H. Pentecost, Chair  
Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 15th day of April, 2022.

  
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Barbara Jay  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.